UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL COSME, Plaintiff, - against - CITY OF NEW YORK, et al. Defendants.	14 Civ. 1653 (JMF)
CARLOS PEREZ, Plaintiff, - against – CITY OF NEW YORK, et al. Defendants.	14 Civ. 1654 (JMF)
DEVON AYERS, Plaintiff, - against - CITY OF NEW YORK, et al. Defendants.	14 Civ. 1655 (JMF)

MEMORANDUM OF LAW OF PLAINTIFFS MICHAEL COSME, CARLOS PEREZ, AND DEVON AYERS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT THOMAS AIELLO

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PRELIMINARY STATEMENT

In 1997, Plaintiffs Michael Cosme, Carlos Perez, and Devon Ayers ("Plaintiffs") were convicted of a double-murder conspiracy. The following year, surveillance footage starkly contradicting the testimony of a key prosecution witness was "discovered" by the prosecutor "in a box belonging to Detective Aiello." Ex. 1 at CP0010996.[1] The footage had never been disclosed to Plaintiffs or their criminal defense attorneys. It had also never been disclosed to the prosecutor, who was misled to believe "it did not have anything to do with" the prosecution. *Id.* at CP0010971. When the judge who presided over Plaintiffs' criminal trial learned during a co-defendant's trial what the video showed, he described the footage as "Brady material" and offered Plaintiffs' co-defendant a mistrial. *Id.* at CP0010992. Yet Plaintiffs did not learn that exculpatory footage existed until they had served nearly two decades in prison for crimes they did not commit.

There is no dispute over what is on the tape. There is no dispute about the substance of Kim Alexander's testimony, which is blatantly inconsistent with the footage. Instead, for years after the footage came to light, the only real dispute arose from Defendants' claim that Defendant Thomas Aiello had never seen the tape and did not know of its impeachment value at the time he investigated Plaintiffs for murder. Thus, when the civil rights claims of Plaintiffs' criminal co-defendant and fellow exoneree Israel Vasquez were before this Court, Defendants moved for summary judgment dismissing Vasquez's *Brady* claim based on an asserted lack of proof "that the surveillance footage on the R-1 tape was the very same footage Aiello watched and allegedly suppressed in 1995." Ex. 2 at 15.

But last year, Defendants quietly produced evidence that was never disclosed during discovery in the *Vasquez* litigation: a handwritten log from 1995 of audiovisual evidence examined by NYPD personnel in the Tape and Records Unit at 1 Police Plaza. There, next to

[1] Citations to "Ex." refer to the numbered exhibits annexed to the accompanying Declaration of David A. Lebowitz.

Aiello's name, is a January 31, 1995 log entry that matches an obscure alphanumerical identification code on the label of the exculpatory surveillance tape. *Compare* Ex. 3 at DEFTS_048298-99, *with* Ex. 35. The City of New York's designated witness on the handling of audiovisual evidence testified that the log entry means Detective Aiello viewed the tape on January 31, 1995. Ex. 4 at 34-35.

Defendant Aiello has now been forced to admit that early in the investigation, long before Plaintiffs' trial, "he was in possession of the VHS" containing the exculpatory footage and watched it at a specialized facility at NYPD headquarters designed for the careful review of such tapes. Ex. 5, Req. for Admis. Resp. Nos. 1-2; Ex. 4 at 34-38. Unlike in *Vasquez*, now, "Defendants do not contend that Aiello and/or Donnelly was unaware of the contents of the 'R-1' footage prior to the convictions of plaintiffs Ayers, Cosme, and Perez." Ex. 6, Interrog. Resp. No. 3(e). That is all that is needed to establish Aiello's liability for violating Plaintiffs' due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

No reasonable jury could fail to find such liability in light of the undisputed facts here. The Assistant District Attorney who prosecuted Plaintiffs stated on the record during a co-defendant's 1998 trial that Defendant Aiello lied about the whereabouts and contents of the surveillance video. *See* Ex. 1 at CP0010995-96. Aiello, who claims not to remember the substance of any conversations about the footage with prosecutors, can muster no more than conjecture to dispute that assertion. Ex. 22 at 193; Ex. 24 at 565. There can also be no dispute that the footage—which shows murder victim Denise Raymond leaving her office with a female companion, unmolested by anyone, and is time-stamped 6:15 p.m. on the date of her murder, *see* Ex. 7—undermines the testimony of Alexander. That testimony, in which Alexander claimed that Raymond was harassed on her way home that night by Charles McKinnon (Plaintiffs' alleged boss in the Raymond murder plot) was relied upon heavily by the prosecution—

including in summation, *see* Ex. 18 at CP0017775—to obtain Plaintiffs' convictions. The surveillance footage would have devastated the case against Plaintiffs, discrediting the law enforcement theory of motive and opportunity and casting doubt upon the integrity of Defendants' entire investigation. That is, no doubt, why Defendant Aiello buried it in the first place. Plaintiffs are entitled to partial summary judgment against Defendant Aiello as to liability on their *Brady* claims.

FACTUAL BACKGROUND[2]

According to NYPD records of the investigation into the murder of Denise Raymond, Kim Alexander first came to the attention of the police on January 19, 1995, the day after Raymond's body was discovered in her apartment. Detective Robert A. Nugent was contacted by a FedEx security worker, who explained that Alexander had reported that she left work with Raymond on the night of her murder around 6:15 or 6:30 p.m. Ex. 8 at DEFTS_013495. Alexander said she had walked to the elevator with Raymond, who was carrying a red Macy's shopping bag and a purse and wearing a dark coat. *Id.* "As they exited the offices of Fedex to get the elevator a male black appeared from behind one of the columns. The victim was surprised to see him." *Id.* Alexander provided FedEx security with a description of the man, and said "that she would be able to identify him if she saw him again." *Id.*

Defendant Aiello interviewed Alexander the following day, taking a handwritten statement, which Alexander signed. Ex. 9. In the statement, Alexander said that on Tuesday, January 17, 1995 at about 6:15 p.m. she left work with Raymond, who was wearing a dark coat

[2] This section contains a brief overview of the facts relevant to Plaintiffs' motion, described in the light most favorable to Defendants. Plaintiffs respectfully refer the Court to Plaintiffs' Local Rule 56.1 Statement for a complete recitation of the pertinent uncontested facts. This memorandum cites the factual record throughout in support of specific arguments.

and a cranberry or maroon skirt suit and was carrying a red Macy's shopping bag with several things in it, including a holiday wreath. *Id.* at DEFTS_035354, DEFTS_035356.[3]

Alexander said that as she and Raymond exited from their office suite into the elevator bank on their floor, she saw a black man come around from behind a column; Alexander said that she was startled, but Raymond knew the individual. *Id.* Alexander said that Raymond seemed to be annoyed and asked the man, "What are you doing here[?]" *Id.* at DEFTS_035355. Alexander claimed that as she pushed the button for the elevator, she heard the man say, "I just wanted to see you," or "I just wanted to see how you are doing." *Id.* According to Alexander, the man had a dark-colored cotton gym bag that was approximately two feet long; Raymond asked the man, "What's in the bag[?]" *Id.* Alexander said that the group rode the elevator down to the lobby as Raymond and the man spoke in low voices. *Id.* Alexander said she heard Raymond say something to the effect of, "I can't believe [you're] here." *Id.* According to Alexander's statement, when they reached the lobby, Alexander continued toward the exit while "Denise stopped" and "had a conversation with that man." *Id.* Alexander then exited the building to the right (toward 33rd Street), while Raymond and the man went to the left. *Id.* at DEFTS_035355-56. Alexander stated that "that was the last time I saw them." *Id.* at DEFTS_035356. She provided Detective Aiello with a description of the man. *Id.*

During Aiello's January 20, 1995 meeting with Alexander, Aiello showed Alexander surveillance footage from 5 Penn Plaza. According to Aiello's report, Alexander "did not see victim or perp." Ex. 11 at DEFTS_035348. In his notebook, Aiello documented Alexander's failure to see herself, Raymond *or* the supposed stalker on the footage as an instance of "negative results." Ex. 12 at DEFTS_044320; Ex. 26 at 188.

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[3] This description of Raymond's outfit and parcels matched police findings at the crime scene. *See* Ex. 10 at DEFTS_032708 (noting that Raymond "wore a maroon blazer outfit, black slip and dark nylon stockings (panty hose)," observing that her "handbag was apparently turned upside down," and noting that "in the kitchen there was a red Macy's shopping bag with a wreath").

According to his reports, Detective Aiello next met with Alexander on January 22, 1995 at her home. Ex. 13 at DEFTS_032728. Aiello showed Alexander "approx. 35" of Denise Raymond's personal photographs, as well as three photo arrays. *Id.* According to Aiello, Alexander positively identified Charles McKinnon "as the man who meets Denise on the 12th floor of Federal Express on 1-17-95." *Id.* By contrast, Alexander's contemporaneous signed handwritten statement indicates that two of the photographs she viewed depicted a man with features similar to the man she remembered seeing, but she could not "tell his build or stature" and therefore could not be sure if the man in the photos was the man she remembered seeing. Ex. 14 at DEFTS_012213; *see also* Ex. 1 at CP0010639 (Alexander "was very clear with the detective that [she] was not comfortable" identifying the man from the photograph because "as much of my recollection of the person was based on seeing their face as it was the stature and build of the individual"). After Alexander selected the photographs, Defendant Aiello told her "it was the defendant." Ex. 1 at CP0010615; *see also id.* at CP0010617.

Aiello next met with Alexander on January 31, 1995. During that meeting, Aiello showed Alexander police surveillance video of McKinnon, filmed outside McKinnon's residence in Queens. Based on that footage—which the judge at McKinnon's trial later deemed "suggestive," Ex. 1 at CP0010665—Alexander identified McKinnon as the man she remembered seeing at 5 Penn Plaza on January 17. *See* Ex. 15 at DEFTS_035370.

Immediately after that meeting—in which Alexander, with Aiello's prodding, had finally given a positive identification of McKinnon—Aiello went to 1 Police Plaza and viewed the 5 Penn Plaza security footage from January 17, 1995. Ex. 15 at DEFTS_035370; Ex. 3 at DEFTS_048298-99; Ex. 5, Req. for Admis. Resp. Nos. 1-2; *see also* Ex. 4 at 34-35. The equipment Aiello used permitted him to view time lapse surveillance footage, slow down the playback, and isolate frames. Ex. 4 at 58-59. As still frames from the tape make clear, the footage clearly showed Raymond, wearing a skirt suit and dark coat and carrying a shopping bag and purse, leaving work with Alexander at 6:15 p.m. on January 17, 1995. Ex. 7. Aiello was aware of the footage's exculpatory contents. Ex. 6, Interrog. Resp. No. 3(e). Yet Aiello reported that on January 31, 1995, he "viewed the tape . . . with negative results." Ex. 15 at DEFTS_035370.

A few weeks later, Alexander testified in Plaintiffs' grand jury proceedings, repeating her claim that Charles McKinnon had stalked and harassed Denise Raymond on January 17, 1995, shortly before Raymond's murder. Ex. 16 at DEFTS_036528-39. Plaintiffs were indicted for the Raymond murder on March 6, 1995. Ex. 17 at CP0009197. In support of the conspiracy count, the indictment charged one overt act: that "Charles McKinnon confronted Denise Raymond on Jan. 17, 1995 at Five Penn Plaza, N.Y., N.Y." *Id.* at CP0009189. At Plaintiffs' trial, which occurred in late 1996 and early 1997, the prosecution argued that "Denise's murder had been contracted by a man named McKinnon[,] a former boyfriend," and that Plaintiffs were called upon to "carry out that contract." Ex. 18 at CP0015121. Alexander once again testified about the supposed confrontation between McKinnon and Raymond at 5 Penn Plaza on the day of the murder. *Id.* at CP0015490-508. In summation, the prosecutor relied on Alexander's testimony about McKinnon's alleged confrontation with Raymond at 5 Penn Plaza to argue that McKinnon was tracking Raymond's whereabouts in order to report to Plaintiffs exactly when they should infiltrate her otherwise secure apartment building and murder her. *Id.* at CP0017775. Plaintiffs were convicted by a unanimous vote of the jury. *Id.* at CP0018128-41.

Charles McKinnon was tried separately in 1998 for his alleged role in the Raymond murder. McKinnon's defense attorney, Edward Dudley, repeatedly inquired on the record about the status of the 5 Penn Plaza surveillance tapes. In response, the prosecutor, ADA

Daniel McCarthy, told the court that he had "[n]o idea" what had happened to the tapes. Ex. 1 at CP0010939. Based on Detective Aiello's representations, McCarthy informed the court that "[t]he security tapes were never in the possession of the police or myself." *Id.* at CP0010940. He explained that the tapes had not been preserved "[b]ecause there's nothing on them." *Id.*; *see also id.* at CP0010964 ("with respect to those tapes I have, my understanding they are not in possession of either the police or certainly my office").

As the trial neared its conclusion, Dudley "spoke to a security guard" at 5 Penn Plaza who remembered watching surveillance footage with detectives from the NYPD that showed Raymond exiting work "with another woman" on the night in question. *Id.* at CP0010957. That witness had told Dudley that "the detectives took the tapes." *Id.* On Friday, March 6, 1998, Dudley reported these events to the judge, who directed ADA McCarthy "to specifically ask Detective Aiello and Detective Donnelly whether they ever took the tapes." *Id.* at CP0010967.

The following Monday, McCarthy explained to the court that he had spoken to Detective Aiello on Friday, March 6 "with respect to whether or not he did or did not have tapes at any point in time." *Id.* at CP0010970. According to McCarthy, after initially reiterating that he had never possessed the tapes, Aiello then called back to explain that "he did have a copy of the tape somewhere in his files." *Id.* McCarthy ultimately found two 5 Penn Plaza surveillance tapes in Detective Aiello's files. *Id.* at CP0010970-71. McCarthy explained that until he viewed the footage on Friday, March 6, 1998, he "was of the opinion it did not have anything to do with this prosecution." *Id.* at CP0010971.

The judge presiding over McKinnon's trial noted that the footage was "Brady material," *id.* at CP0010992, and admonished the prosecution for its "serious" failure "to turn over these tapes sooner," *id.* at CP0010991. The court offered McKinnon a mistrial, which

McKinnon declined. *Id.* at CP0010992. Ultimately, the parties stipulated that "Assistant District Attorney McCarthy was informed by Detective Aiello that the video . . . was not seized by him in January 1995 because he did not see the deceased, Kim Alexander or the defendant on the tape." *Id.* at CP0010995-96. The stipulation clarified that McCarthy had "discovered the tape was in a box belonging to Detective Aiello," notwithstanding Aiello's claim that he never possessed it. *Id.* at CP0010996. The parties further stipulated, contrary to Aiello's representations to the prosecutor, that the tape showed Denise Raymond and Kim Alexander in two frames time stamped 6:15 p.m. *Id.*

During deliberations, the jury asked for read-backs of the stipulation, the testimony about Raymond's departure from her office on the day of her death, and the testimony about Alexander's various meetings with Defendant Aiello. *See, e.g.*, Ex. 1 at CP0011182 (request for read-back of stipulation); *id.* at CP0011214 (jury note requesting read-back of Alexander's testimony about the encounter with McKinnon); *id.* at CP0011254 (jury note requesting read-back of stipulation *again* and asking "what is a stipulation and how much weight does it carry"); *id.* at CP0011254-55 (jury note requesting read-back of Kim Alexander's direct testimony); *id.* at CP0011265 (jury note requesting "to hear every bit of testimony pertaining to Kim Alexander mentioning time"); *id.* at CP0011278 (jury note requesting "testimony of Kim Alexander concerning Detective Aiello's interview in her office and all testimony pertaining to the photographs and interview in her apartment"); CP0011279 (jury note requesting testimony of "Kim Alexander from when she first saw Charles until she looked back at the bank"). The jury then acquitted McKinnon. *Id.* at CP0011328.

Plaintiffs did not learn of the existence of the exculpatory surveillance footage at the time of trial or thereafter, until this Court unsealed the McKinnon trial transcript during the *Vasquez* litigation. *See* Ex. 19 at CP0005258 ¶ 6; Ex. 20 at CP005281 ¶¶ 4-5; Ex. 21 at

DEFTS_017316-17 ¶¶ 3-4. Not long thereafter, their convictions were vacated with the consent of the Bronx District Attorney's Office. Plaintiffs were released after serving approximately 18 years each in prison.

ARGUMENT

Defendant Aiello is liable to Plaintiffs under 42 U.S.C. § 1983 for denying their constitutional right to due process of law by violating the disclosure requirement of *Brady*. *Poventud v. City of N.Y.*, 750 F.3d 121, 132 n.2 (2d Cir. 2014) (en banc). "'There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *Id.* at 133. Because undisputed evidence in these cases establishes all of these elements, Plaintiffs are entitled partial summary judgment in their favor on the issue of Aiello's liability on their *Brady* claim. Fed. R. Civ. P. 56(a).

I. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE ELEMENT OF FAVORABILITY

"Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). Here, the evidence in question is a contemporaneous videotape that not only calls the testimony of a prosecution witness into doubt, but definitively shows that key events did not occur as she described. There is no room for dispute on the element of favorability.

Alexander's uncontradicted trial testimony falsely informed the jurors who convicted Plaintiffs that Charles McKinnon confronted Denise Raymond at her workplace just hours before she was killed. According to Alexander, the confrontation made Raymond "angry," and she told McKinnon: "I don't want to talk to you. I don't want anything to do with you." Ex. 18 at CP0015500. Alexander claimed that when she left Raymond, Raymond was continuing to argue with McKinnon and "seemed to be very agitated and seemed to be very annoyed." *Id.* at CP0015504. Alexander testified that she never saw Raymond alive again. *Id.* at CP0015505. This testimony was consistent with Alexander's description of these alleged events to Defendant Aiello early in the Raymond murder investigation. *See, e.g.*, Ex. 9 at DEFTS_035354-56; Ex. 14 at DEFTS_012213.

As Detective Aiello admitted under oath, the alleged confrontation between McKinnon and Raymond was important evidence supporting the police's theory of the motive for Raymond's murder. Ex. 22 at 206. According to Detective Aiello, Alexander's description of the confrontation at 5 Penn Plaza substantiated the hypothesis that the motive for Raymond's murder stemmed from McKinnon and Raymond's social relationship. Ex. 22 at 109-10.

Alexander's claims were equally important to the case against Plaintiffs as to the case against McKinnon. Plaintiffs concededly did not know Raymond. Rather, they were alleged to have carried out her murder at McKinnon's behest, after meeting with McKinnon to plan the crime. *See, e.g.*, Ex. 18 at CP0015121. Defendants' own investigation notes document their theory that McKinnon ordered Plaintiffs to kill Raymond because of a "fight" that had erupted between McKinnon and Raymond. Defendant Aiello's notes describe an alleged meeting between McKinnon, Plaintiffs, and others *on the day of the Raymond murder* during which the supposed conspirators discussed how Raymond had to be killed because she "had a fight with Charles + she wants to tell the police." Ex. 12 at DEFTS_011397; *see also id.* at DEFTS_011393 (Aiello's notes describing an alleged meeting attended by Plaintiff Ayers and others during which "Charles said [Raymond] was going to call the police on him. He said 'that bitch was going to call the police on me because I was selling drugs.'").

In short, the police's theory was that (1) Charles McKinnon was in the throes of a heated conflict with Denise Raymond, and (2) McKinnon told Plaintiffs about this disagreement and instructed them to resolve it in McKinnon's favor by killing Raymond. The existence of a "fight" between McKinnon and Raymond was thus the premise of Defendant Aiello's entire investigation of the Raymond murder. McKinnon's alleged confrontation with Raymond at 5 Penn Plaza was the only overt act charged in Plaintiffs' indictment to support the charge of conspiracy among Plaintiffs, McKinnon, and the other accused participants. Ex. 17 at CP0009189. The McKinnon-Raymond dispute was also the only theory of motive presented at Plaintiffs' trial to explain why McKinnon and Plaintiffs—his supposed henchmen—wanted to harm Raymond. The prosecutor explained that McKinnon "is an integral part of this trial with respect to Kim Alexander's testimony, as well as Cathy Gomez's testimony, linking him not only to being the last person seeing Denise Raymond alive, but also to the defendants." Ex. 18 at CP0016831.

Alexander's account was also important evidence used to argue that Plaintiffs had the opportunity to kill Raymond. McKinnon was alleged to have served as the "set up guy" for the Raymond murder. Ex. 18 at CP0017774. The alleged confrontation with Raymond at 5 Penn Plaza was supposedly a way for McKinnon to track Raymond's whereabouts on the day of the pre-planned murder—a necessary part of the scheme because Plaintiffs needed to know when Raymond was leaving work in order to successfully carry out McKinnon's direction to murder her. In summation, the prosecutor argued to the jury:

> [H]anging in the hallway, if there's five or six or seven of you, is not a great idea, unless you know about when Denise is going to come home. How do they know that? Because McKinnon knew when she left Five Penn Plaza. ***Remember Kim Alexander said*** I turned one way to go downtown to Brooklyn, and the last I saw, they were arguing and heading to the uptown train.

Ex. 18 at CP0017775 (emphasis added). According to the theory Defendants developed during their investigation, Plaintiffs escaped the Raymond murder scene quickly in getaway cars, one of which was used by McKinnon to wait out the killing. Ex. 12 at DEFTS_011394; *see also* Ex. 16

at DEFTS_036507 (McKinnon "was getting nervous" when the murder was taking a long time). Alexander's claim about seeing McKinnon stalk Raymond on the night of her murder was therefore important evidence of Plaintiffs' alleged motive and opportunity to commit the Raymond murder.

Evidence contradicting Alexander's statements was clearly favorable to Plaintiffs. "Suppressed evidence is exculpatory and thus 'favorable' to the defense for *Brady* purposes when it directly contradicts the motive theory testified to by prosecution witnesses." *Mendez v. Artuz (Mendez II)*, 303 F.3d 411, 414 (2d Cir. 2002). This is "particularly true when the prosecution's motive theory is weak or unconvincing," *id.*, as was the case at Plaintiffs' trial, *see* Ex. 22 at 110 (Aiello admitted that there was "[u]nfortunately, not that much" motive evidence); *id.* at 114 (discussing hypothesis of a drug-related conspiracy between Plaintiffs and McKinnon, Aiello conceded "all it is is a theory" unsupported by any evidence).

Defendants have suggested that the surveillance footage is somehow not favorable because it was labeled—on the *outside* of the VHS—with the date January 11, 1995. But the fact that the tape may have appeared less important at first glance than it really was only made it *more* critical that Aiello, who knew what the footage showed, specifically alert prosecutors that the tape was favorable to the accused. Defendants do not dispute that the footage is time-stamped January 17, 1995 and shows Denise Raymond leaving 5 Penn Plaza at 6:15 p.m. Ex. 5, Req. for Admis. Resp. Nos. 7-8. Even putting aside the lack of any evidence that the misleading January 11 label was applied by anyone other than Defendant Aiello himself, it in no way diminishes the footage's value as favorable *Brady* evidence. Especially given the other indications that the R-1 footage is a depiction of the events Alexander purported to describe in her testimony—including Raymond's dark skirt suit and shopping bags—Aiello was not entitled to disregard it. *Brady* required Detective Aiello to disclose the tape regardless of his own views about the date, because "it is for the jury . . . to decide whether favorable information in a police record is credible; otherwise 'prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting *Brady* at nought.'" *Mendez v. Artuz (Mendez I)*, No. 98 Civ. 2652, 2000 WL 722613, at *14 (S.D.N.Y. June 6, 2000) (quoting *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985)).

Defendants are equally wrong to assert that the footage would not have helped Plaintiffs at trial because their strategy was to deflect blame onto McKinnon. It would be absurd, in evaluating the favorability of undisclosed evidence, to bind Plaintiffs to the strategy devised by their criminal defense counsel *without the benefit* of that very same evidence. The point of *Brady* is to allow criminal defendants to make the best possible use of exculpatory information. For this reason, "[e]xculpatory evidence is not limited to evidence which supports the defense theory at trial. Evidence which would lead to different trial strategy is also within the *Brady* rule."[4] *People v. Jackson*, 593 N.Y.S.2d 410, 419 (N.Y. Sup. Ct. Kings Cnty. 1992) (a *Brady* violation occurs where a "defendant would have had a better or more successful trial strategy, had the unknown information been known") (collecting authorities).

As Israel Vasquez's criminal defense attorney testified, the lack of impeachment evidence impaired counsel's ability to effectively cross-examine Alexander at trial. Ex. 23 at 169, 252. As the Supreme Court has expressly recognized, a *Brady* violation occurs where the nondisclosure of evidence has "misleadingly induced defense counsel to believe that [witnesses] could not be impeached," *see United States v. Bagley*, 473 U.S. 667, 683 (1985). That is precisely what occurred here. Accordingly, "no reasonable jury could find that evidence [Aiello] withheld was not favorable to [Plaintiffs'] defense." *Conley v. City & Cnty. of S.F.*, No. 12 Civ.

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[4] Indeed, the trial judge offered McKinnon a mistrial once the tape was discovered because he concluded that the availability of the tape would have affected how McKinnon's defense attorney cross-examined Alexander and which witnesses the defense chose to call. Ex. 1 at CP0010992, CP0010994.

00454, 2013 WL 5379376, at *35 (N.D. Cal. Sept. 24, 2013) (granting partial summary judgment to plaintiff on *Brady*-based § 1983 claim).

II. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE ELEMENT OF SUPPRESSION

"Evidence that is not disclosed is suppressed for *Brady* purposes . . . when it is 'known only to police investigators and not to the prosecutor.'" *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149, 161 (2d Cir. 2008) (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). That is exactly the case here.

Defendant Aiello's admissions in discovery foreclose any doubt that he possessed and viewed the R-1 footage in January 1995, long before Plaintiffs' trial. Ex. 5, Req. for Admis. Resp. Nos. 1, 2, 7, 8.[5] The footage was not disclosed to Plaintiffs' criminal defense counsel at the time of trial. *See* Ex. 20 at CP005281 ¶¶ 4-5; Ex. 21 at DEFTS_017316-17 ¶¶ 3-4. The trial prosecutor confirmed on the record during the McKinnon trial that he did not even receive the box containing the tape from the police until "the summer" of 1997 (after Plaintiffs were convicted)[6] and did not become aware of its exculpatory nature until the end of the McKinnon trial in 1998. Ex. 1 at CP0010970. As far as the prosecutor was aware, "[t]he security tapes were never in the possession of" law enforcement, and the tapes were not preserved or disclosed as *Brady* material "[b]ecause there's nothing on them." Ex. 1 at CP0010940.[7]

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[5] Although Defendant Aiello refused to admit that the images do not show McKinnon, the Court can easily ascertain from its own review that McKinnon is not pictured (nor is any black man that could have matched Alexander's description). Ex. 7. Certainly the Court can conclude as a matter of law that the footage would have impeached Alexander's claims that "Denise stopped + had a conversation with" McKinnon while Alexander "went out the exit door to the street before them," Ex. 9 at DEFTS_035355; *see also* Ex. 18 at CP0015502-03 (Alexander claimed she exited the building first with McKinnon and Raymond conversing "two or three steps behind"). Indeed, ADA McCarthy conceded at the McKinnon trial "that the defendant is not shown on" the footage. Ex. 1 at CP0010990.

[6] Even if Defendants somehow claimed that the box was in the possession of the District Attorney's Office on some earlier date, that would not defeat Plaintiffs' claims. An officer does not satisfy his *Brady* disclosure obligations merely by physically placing his personal collection of investigation materials within the four walls of the District Attorney's Office. Materially favorable *Brady* evidence "should not have been buried in a file, but should have been made known to the prosecutor." *Tennison v. City & Cnty. of S.F.*, 570 F.3d 1078, 1090 (9th Cir. 2008).

[7] McCarthy's statements concerning his own lack of notice as to the footage's significance are admissible as statements "of the declarant's then-existing state of mind," because they are not offered to prove the truth of his

Even viewing the facts in the light most favorable to Defendant Aiello, no reasonable jury could conclude that he disclosed the true nature of the footage to prosecutors. Undisputed evidence, coupled with Aiello's own sworn testimony, establishes that:

- McCarthy told the Court during the McKinnon trial that he believed, as a result of Aiello's representations, that "[t]he security tapes were never in the possession of the police." Ex. 1 at CP0010940.

- McCarthy stipulated on the record that he had been "informed by Detective Aiello that the video taken, R-1 in evidence, was not seized by him in January 1995 because [Aiello] *did not see the deceased, Kim Alexander or the defendant on the tape*."[8] Ex. 1 at CP0010996 (emphasis added); *see also* CP0011254 ("By the stipulation both parties submit information contained in the stipulation to the jury as truthful and accurate.").

- Aiello testified that he told McCarthy that his review of the surveillance footage "met with negative results in regards to Charles McKinnon." Ex. 22 at 192. He said he could not recall whether he told McCarthy that Alexander and Raymond appeared on the footage. Ex. 22 at 193; *see also* Ex. 24 at 565 ("I don't recall telling him anything. I just don't recall.").

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beliefs (*i.e.* Plaintiffs seek to prove the *falsity* of McCarthy's averment that "there's nothing on" the R-1 tape). *See* Fed. R. Evid. 803(3). The transcript of McCarthy's statements during the McKinnon trial is admissible under Federal Rules of Evidence 803(6) and/or 803(8) to prove that the statements were made, rather than for their truth. *See United States v. Arias*, 575 F.2d 253, 254 (9th Cir. 1978) (Kennedy, J.); *see also, e.g.*, *Cozzo v. Tangipahoa Parish Council—Pres. Gov't*, 279 F.3d 273, 291 (5th Cir. 2002); *United States v. Jones,* 958 F.2d 520, 521 (2d Cir. 1992); *Vasquez v. McPherson*, 285 F. Supp. 2d 334, 338 (S.D.N.Y. 2003); *United States v. Moher*, 445 F.2d 584, 585 (2d Cir. 1971). All of the transcripts from the 1990s prosecution are independently admissible under Rule 801(d)(2)(B) to prove that the statements offered against Defendants that are recorded therein were in fact made and were accurately transcribed, because Defendants have relied on the transcripts for that purpose.

[8] Aiello's statement to McCarthy about the location and contents of the video is admissible non-hearsay under Federal Rule of Evidence 801(d)(2). McCarthy's statements to the McKinnon trial court reporting Aiello's claims are admissible under Rule 803(3). *See supra* note 8. McCarthy's statements are also admissible under Rule 807(a) because the statements are the most probative evidence on this highly material subject; McCarthy is deceased and therefore unavailable to testify; McCarthy made the statements in court where they were subject to adversarial testing and to the ethical duty of candor to the tribunal; McCarthy made the statements notwithstanding that they contradicted his own previous representations to a sitting judge and were likely to hurt his case, suggesting that a reasonable person in McCarthy's position would have made the statements only if he believed they were true; and Defendant Aiello has personal knowledge of the subject matter and had the opportunity to contest McCarthy's account in his own testimony. *See, e.g.*, *People v. Hameed*, 88 N.Y.2d 232, 238 (1996) (noting that courts are "entitled to rely on the prosecutors' open court, on the record representations, without the need of a formal oath" given prosecutors' "unqualified duty of scrupulous candor"(internal quotation marks omitted)), *writ of habeas corpus denied*, *Majid v. Portuondo*, 428 F.3d 112 (2d Cir. 2005); *see also Furtado v. Bishop*, 604 F.2d 80, 91 (1st Cir. 1979) (upholding admission of out-of-court statement by deceased "eminent attorney" who "was not a person likely to make a cavalier accusation"); *Moffett v. McCauley*, 724 F.2d 581, 584 (7th Cir. 1984) (admitting report under the residual exception where the "official who prepared the report had a business duty and a public obligation to be accurate"). The transcript is admissible under Rules 803(6) and 803(8) to prove the statements were made. *See supra* note 8.

- The City's Rule 30(b)(6) witness on NYPD investigation practices in 1995 testified that detectives must document when evidence is turned over to the District Attorney. Ex. 25 at 76-77. Yet there is no documentation anywhere in the record showing that Aiello disclosed the footage to prosecutors. Nothing in the record otherwise contradicts McCarthy's claim that Aiello told him Alexander and Raymond were not depicted. To the contrary, when confronted with McCarthy's stipulation at the McKinnon trial, Aiello testified: "That's exactly what it says, so that's apparently what I said." Ex. 22 at 212.

- Aiello's only written documentation of his viewing of the tape was a DD5 stating that on January 31, 1995, he "viewed the tape . . . with negative results." Ex. 15. Detective Aiello testified under oath that "negative results" meant that neither McKinnon, Alexander, nor Raymond appeared. Ex. 26 at 188. When asked to interpret his *own* documentation of the January 31, 1995 viewing, Aiello testified: "I know I went there. Oh, God. Now, did I bring those tapes there? I should have mentioned it. I don't know, I don't know." Ex. 22 at 196. Given Aiello's inability to derive any meaning from his own notation, no reasonable jury could conclude that it adequately informed ADA McCarthy (let alone Plaintiffs) of the footage's contents.

- The City's Rule 30(b)(6) witness on NYPD investigation policies in 1995 testified that detectives should "never use" the term "negative results" because it "doesn't explain anything." Ex. 25 at 64-65.

- The City's Rule 30(b)(6) witness on the handling of audiovisual evidence in 1995 testified that the NYPD Audio/Video Unit's log from 1995 showed that Aiello had viewed the tape on January 31, 1995 at a facility specially equipped for the careful review of audiovisual evidence. Ex. 4 at 34, 57-59. The witness further testified that Aiello's actions—not requesting that the tape be copied, not requesting that any still images be printed from the tape, and instructing the on-duty technician to record "couldn't find perps" on the log—would indicate that the footage was treated as lacking any investigative value. Ex. 4 at 37-38.

Under the circumstances, there would be no basis for a jury to conclude that Defendant Aiello ever disclosed the existence of the *Brady* footage to Plaintiffs, their counsel, or prosecutors. The *only* pertinent evidence suggests that the tape was suppressed, and Defendant Aiello claims (at best) not to recall one way or the other. But the "assertion of a lack of memory is not a denial" sufficient to create a material issue of fact on summary judgment. *Mitchell v. Cnty. of Nassau*, 786 F. Supp. 2d 545, 560 (E.D.N.Y. 2011); *accord Costello v. St. Francis Hosp.*, 258 F. Supp. 2d 144, 148 (E.D.N.Y. 2003). Defendant Aiello cannot "do more than simply show that there is some metaphysical doubt as to the material facts." *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Accordingly, partial summary judgment is appropriate. *Conley*, 2013 WL 5379376, at *36 (granting partial summary judgment to Plaintiff on *Brady* claim under § 1983 with regard to evidence items where defendants "presented no evidence to suggest" officer had made disclosures to prosecutors).

In the face of the overwhelming evidence of nondisclosure, Aiello has argued that his "negative results" DD5 was a good enough hint for Plaintiffs or their criminal defense counsel to have somehow intuited the exculpatory value of the footage and found it for themselves. That assertion is preposterous. The Supreme Court reaffirmed just this month that *Brady*'s disclosure requirement is *not* satisfied where the accused has notice of an unelaborated fact but no way to ascertain its exculpatory significance. In *Wearry v. Cain*, ---S. Ct. ----, 2016 WL 854158 (U.S. Mar. 7, 2016), the Court held that Louisiana prosecutors violated *Brady* by failing to disclose medical records showing that Wearry's alleged co-conspirator, who a prosecution witness claimed had manhandled the alleged victim, received major knee surgery nine days before the crime. *Id.* at *2 & n.3. The Court found that this failure violated *Brady*, even though a witness had *testified* that the alleged conspirator "had had surgery on his knee 'about nine days before the homicide happened.'" *Id.* That testimony was not enough to satisfy due process because "neither Wearry nor the jury had any way of knowing what the medical records would have revealed: Hutchinson had undergone a patellar-tendon repair rather than a routine minor procedure." *Id.* In other words, the prosecution's failure to disclose the *specific type* of knee surgery obscured the exculpatory import of the information, notwithstanding that Wearry was aware of it in general terms. Likewise, Defendant Aiello's failure to document and disclose the *contents* of the Fedex footage—and its conflicts with Alexander's account—violated *Brady* even if Plaintiffs had notice that a tape once existed somewhere.

Defendants rely on the unremarkable proposition that "[e]vidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence," *see United States v. Leroy*, 687 F.3d 610, 618 (2d Cir. 1982). But that rule, to the extent it survives *Wearry* at all, applies only where exculpatory evidence is available through "basic investigatory steps" by the defense. *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). The Second Circuit has squarely rejected Defendants' view, holding that the "should have known" standard:

> speaks to facts already within the defendant's purview, not those that might be unearthed. It imposes no duty upon a defendant, who was reasonably unaware of exculpatory information, to take affirmative steps to seek out and uncover such information in the possession of the prosecution in order to prevail under *Brady*.

Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 121 (2d Cir. 2015). That is dispositive here.

In Defendants' view, Plaintiffs should have: (1) divined that, contrary to Aiello's own understanding, "negative results" meant Raymond and Alexander *were* depicted on the footage, while McKinnon was not; (2) disregarded the prosecutor's assurances that the tapes showed "nothing" relevant to the case; and (3) sent an investigator or lawyer to 5 Penn Plaza in the hopes that he or she would get "lucky" (as McKinnon's defense attorney did, *see* Ex. 1 at CP0010957) and locate a witness who knew Aiello was lying about where the tapes were and what was on them. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 697 (2004) (rejecting the proposition that defendants have the burden to discover concealed evidence "so long as the 'potential existence'" of a *Brady* claim "might have been detected" from the information available); *Lewis*, 790 F.3d at 121 (rejecting imposition of an affirmative "due diligence" requirement under *Brady* as contrary to clearly established law); *Leka*, 257 F.3d at 103 (observing that "without substantive disclosure by the prosecution, the supposed failure by the defense . . . to seek out [suppressed evidence] cannot fairly be seen as a default or a neglect, or even as an election").

The implausibility of Defendants' arguments is laid bare by the fact that neither McKinnon's defense attorney nor the prosecutor gleaned from Aiello's notes that the footage depicted Raymond exiting 5 Penn Plaza. *See* Ex. 1 at CP0010958 (Dudley: "the impression I had always gotten was that she was not on the tapes at all"); *id.* at CP0010940 (McCarthy believed the tapes showed "nothing"). *Everyone* was understandably misled by Aiello's notes, which indisputably use the phrase "negative results" to signify the absence of McKinnon, Alexander, *and* Raymond, *see* Ex. 12 at DEFTS_044320; Ex. 26 at 188. Without at the very least "tak[ing] affirmative steps to seek out and uncover" the footage, *see Lewis*, 790 F.3d at 121, there is no way Plaintiffs could have learned that the footage impeached Alexander's testimony. Accordingly, Plaintiffs are entitled to summary judgment on the element of suppression.

III. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE ELEMENT OF PREJUDICE

"To establish prejudice, a plaintiff must show materiality." *Poventud*, 750 F.3d at 133. As the en banc Second Circuit recently reiterated:

> A showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). The touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but *whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.*

Id. (emphasis in original) (quoting *Leka*, 257 F.3d at 104). "The materialty test is 'not a sufficiency of evidence test,'" and Plaintiffs "'need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.'" *Leka*, 257 F.3d at 104 (alteration supplied) (quoting *Kyles*, 514 U.S. at 434).

Accordingly, Plaintiffs "can prevail even if . . . the undisclosed information may not have affected the jury's verdict." *Wearry*, 2016 WL 854158, at *3 n.6.

No reasonable jury could conclude that the evidence Aiello suppressed was immaterial under the liberal *Kyles* standard.[9] "Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case." *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005). That is precisely the case here.

A. Alexander Was the Government's Only Witness on Motive and Opportunity

The evidence supplied by Kim Alexander—which the suppressed footage would have impeached—was essential to the case against Plaintiffs, because it supplied the law enforcement theory of both motive and opportunity for the Raymond homicide. No other witness testified that any of the people alleged to be responsible for Raymond's death were involved in any kind of conflict or dispute with her, nor did any other witness testify that any of the supposed conspirators had been in contact with Raymond around the time of the murder. The prosecution relied heavily on Alexander's testimony to establish motive and opportunity. *See supra* Part I(A).

Particularly in a case otherwise based almost entirely on the equivocal, implausible, and self-contradictory testimony of Cathy Gomez and Miriam Tavares, *see Vazquez v. City of N.Y.*, No. 10 Civ. 6277, 2014 WL 4388497, at *1-*4 (S.D.N.Y. Sept. 5, 2014), there is no doubt that Alexander's testimony on motive and opportunity was a vital component of the government's theory.[10] *See Triumph Capital Grp.*, 544 F.3d at 162 (where prosecution witness had testified about criminal defendant's participation in a key conversation to show defendant's state of mind, evidence that "support[ed] an alternative version" of the conversation that was "entirely at odds with the government's theory of the case at trial" was material for *Brady* purposes); *Buchli v. State*, 242 S.W.3d 449, 453-56 (Mo. Ct. App. 2007) (suppressed surveillance footage that contradicted prosecution theory and timeline argued in summation was material under *Brady*); *United States v. Pelullo*, 105 F.3d 117, 122-24 (3d Cir. 1997) (finding material *Brady* violation from suppression of surveillance footage that would have impeached government witness's claim of a meeting that supplied the motive for the charged offense); *see also Jells v. Mitchell*, 538 F.3d 478, 506 (6th Cir. 2008) (suppressed evidence contradicting witness accounts of an altercation between criminal defendant and victim was material under *Brady* where prosecution theory alleged an abduction); *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 560-67 (E.D. Va. 2011) (suppressed impeachment evidence undermining prosecution's motive theory in murder-for-hire prosecution was material under *Brady*); *United States v. Patrick*, 985 F. Supp. 543, 562 (E.D. Pa. 1997) (suppressed evidence impeaching credibility of prosecution witness who supplied motive for alleged conspiracy was material for *Brady* purposes because credibility of motive witness "was critically important in establishing the government's entire theory of the case"). The suppressed footage would have dramatically impeached Alexander's account and cast doubt on the entire premise of Plaintiffs' prosecution.

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[9] While the factual component of a materiality inquiry is ordinarily a jury question, *see Walcyzk v. Rio*, 496 F.3d 139, 158 (2d Cir. 2007), materiality may be decided as a matter of law where the relevant facts are not in dispute, *see, e.g.*, *id.* at 162-63 (finding evidence withheld from magistrate in search warrant affidavit material as a matter of law); *S.E.C. v. Research Automation Corp.*, 585 F.2d 31, 35-36 (2d Cir. 1978) (affirming summary judgment in securities fraud action where omissions were "so obviously important . . . that reasonable minds cannot differ on the question of materiality"(internal quotation marks omitted)). In the *Brady* context, where the contents of suppressed evidence are not meaningfully in dispute, the court may determine their materiality as a matter of law. *See United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007) (observing that "once the existence and content of undisclosed evidence has been established, the assessment of the materiality of this evidence under *Brady* is a question of law"); *accord Wilson v. Beard*, 589 F.3d 651, 657 n.1 (3d Cir. 2099); *see also United States v. Mahaffy*, 693 F.3d 113, 127 (2d Cir. 2012) ("we examine the record *de novo* to determine whether the evidence in question is material as a matter of law"); *id.* at 133-34 (reversing trial judge's materiality finding to find *Brady* violation as a matter of law).

B. Alexander Was the Only Link Between Plaintiffs and the Alleged Conspiracy

Alexander also supplied the only link between Plaintiffs and the nefarious criminal conspiracy that was supposedly responsible for the Raymond murder. The prosecution

[10] Tellingly, in defending the sufficiency of the evidence against Plaintffs, both the trial judge and the prosecution began their description of the Raymond murder with an overview of Alexander's testimony. *See* Ex. 27 at DEFTS_025333; Ex. 28 at DEFTS_019634; Ex. 29 at DEFTS_020564; Ex. 30 at DEFTS_017034.

repeatedly argued that Charles McKinnon was the mastermind of the Raymond homicide, and that Plaintiffs murdered Raymond on behalf of McKinnon to settle a disagreement between Raymond and McKinnon. *See, e.g.*, Ex. 18 at CP0015121 (People's opening), CP0017773-76, CP0017787-88 (People's summation). But the only *evidence* concerning McKinnon's role offered at Plaintiffs' trial was (1) testimony by Denise Raymond's sister that McKinnon was a former boyfriend of Raymond's, *see id.* at CP0015133-36; (2) vague and equivocal testimony by Cathy Gomez—largely adduced through the prosecutor's impeachment of Gomez with her own grand jury testimony—concerning McKinnon's alleged presence during conversations where the Raymond murder was supposedly discussed, *see id.* at CP0015560-64, CP0015625-29; and (3) Alexander's detailed and dramatic testimony concerning McKinnon's upsetting confrontation with Raymond shortly before her death, *see id.*at CP0015490-507.

Because there was concededly *no* link between Plaintiffs and Raymond other than the alleged conspiracy involving McKinnon, evidence concerning McKinnon's supposed confrontation of Raymond was crucial to the prosecution's entire theory, including the case against Plaintiffs. *See United States v. Vozzella*, 124 F.3d 389, 393 (2d Cir. 1997) (failure to disclose evidence suggesting that defendant's alleged co-conspirator did not actually participate in charged scheme was material because "evidence that would exculpate" the alleged co-conspirator "would automatically tend to exculpate [the defendant] on the conspiracy charges"). Moreover, Alexander's claim of a heated disagreement between McKinnon and Raymond corroborated Gomez, rendering her otherwise unsupported claims about a "fight" between McKinnon and Raymond suddenly believable.[11] *See Wearry*, 2016 WL 854158, at *4 (finding

[11] According to Detective Aiello, Gomez provided the link between Mr. McKinnon and Plaintiffs that the police needed to prove their conspiracy theory. *See, e.g.*, Ex. 22 at 107-08 (Gomez explained "what [Plaintiffs'] roles were, how they knew Charles, how she knew Charles. It just all came together."), 110-11, 116-17 (Ms. Gomez supplied the theory that McKinnon was Plaintiff Perez's drug wholesaler), 207. Indeed, as Defendant Aiello admitted, Gomez's statements were the only evidence linking McKinnon to Plaintiffs. *Id.* at 113.

prejudice under *Brady* where suppressed evidence would have impeached one prosecution witness and thereby undermined corroboration of another prosecution witness).

C. The Footage Would Have Eroded Confidence in the Entire Investigation

Wholly apart from any impact on the jury's beliefs about what happened at 5 Penn Plaza on January 17, 1995, learning of the undisclosed surveillance footage would have deeply undercut the jurors' confidence in the overall police investigation into the Raymond and Diop homicides. As Plaintiff Perez's trial counsel has explained:

> Not only would the videotape have been relevant to the credibility of one prosecution witness, this evidence would have allowed me to attack the integrity of the entire investigation by showing that a lead detective in the homicide of Raymond, Thomas Aiello, deliberately concealed exculpatory evidence from the prosecutor. This suppression of relevant information calls into question the entire investigation, as well as the prosecution's conspiracy theory, and would have altered my entire defense strategy.

Ex. 21 at DEFTS_017317 ¶ 4.

It is well settled that "information which undercuts the thoroughness and good faith of a police investigation is a factor to be considered in determining whether withheld information is exculpatory." *Mendez I*, 2000 WL 722613, at *19, *aff'd*, 303 F.3d at 416 (*Brady* violation was prejudicial where the accused could have "used the suppressed information to challenge the thoroughness and adequacy of the police investigation"). Had the jurors been told that Defendant Aiello relied on a witness whose account he knew was contradicted by surveillance footage, there is more than a reasonable probability that their confidence in the investigation would have been severely undermined. *See Kyles*, 514 U.S. at 445 (undisclosed evidence that "would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation" and "revealed a remarkably uncritical attitude on the part of the police" material under *Brady*); *accord United States v. McDuffie*, 454 F. App'x 624, 626 (9th Cir. 2011) ("had [the defendant] been able to present a coherent theory of evidence tampering, there is a reasonable probability that the jury would have discredited [the detective] and reached a different conclusion in the case"). That was precisely the strategy employed by McKinnon's criminal defense attorney in obtaining his acquittal. *See* Ex. 1 at CP0011037 ("Detective Aiello . . . is a person you cannot trust"); *id.* at CP0011049-50.

D. Suppression of the Footage Sharply Curtailed Plaintiffs' Trial Strategy

Fourth, by depriving Plaintiffs' criminal defense counsel of the opportunity to impeach Alexander, Defendant Aiello's suppression of the surveillance footage saddled Plaintiffs with a problematic defense strategy. Alexander's unchallenged testimony about the 5 Penn Plaza altercation made it foolhardy for Plaintiffs' trial counsel to dispute McKinnon's culpability for the Raymond murder. The defense attorneys therefore conceded McKinnon's involvement—a crucial aspect of the prosecution's theory—and disputed only his alleged connection to Plaintiffs, who did not testify in their own defense and thus could not directly challenge the existence of the alleged conspiracy. *See* Ex. 18 at CP0017594-95 (summation of Plaintiff Cosme's counsel); *id.* at CP0017627-29 (summation of Plaintiff Ayers's counsel). As the Supreme Court and the Second Circuit have observed, evidence is material under *Brady* if it deprives the defense of "lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley*, 473 U.S. at 683; *see also Leka*, 257 F.3d at 103.

E. The Johnson Declaration Independently Establishes Prejudice

Finally, the Court need not infer that disclosure of the suppressed footage would have affected the verdict, because trial juror Theodore Johnson has averred as much in his declaration.[12] *See* Ex. 31. This declaration alone suffices to show that "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment," *Cone v. Bell*, 556 U.S. 449, 452 (2009), and is therefore material as a matter of law. *See also Milke*,

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[12] The McKinnon trial jurors' heavy reliance on the video in reaching the decision to acquit is also strong evidence of materiality. *See supra* note 4 and accompanying text.

711 F.3d at 1019 ("If *even a single juror* had found Saldate untrustworthy . . . there would have been at least a hung jury." (emphasis added)).

F. The Footage Would Not Have Been Cumulative

Any suggestion by Defendants that the suppressed footage would have been cumulative of the impeachment material already available to Plaintiffs' criminal defense counsel concerning Alexander—such as conflicting accounts of Raymond's exit from work on the night of the murder provided by other co-workers—is wrong. Settled law "rejects this strained logic," recognizing that:

> a defendant's conviction in spite of his attempt at impeaching a key government witness demonstrates only the inadequacy of the impeachment material *actually presented*, not that of the suppressed impeachment material; in light of the failure of the impeachment attempt at trial, the suppressed impeachment material make take on an even greater importance.

Silva, 416 F.3d at 989 (internal quotation marks and alteration omitted). Certainly, the fact that some FedEx employees apparently believed Raymond had left at 6:00 with a different co-worker, *see* Ex. 32; Ex. 33, would not have been equivalent to surveillance video showing that Raymond *did* leave work with Alexander at 6:15 and that McKinnon was not there. Likewise, as detailed *supra* Part II, nothing in Aiello's reports could reasonably be said to have informed Plaintiffs about the exculpatory nature of the footage. As this Court has recognized, "contrary to defendant's contention," Plaintiffs were "not on notice of the tape" because "Aiello falsely reported that the victim did not appear on the tape." Ex. 34 at CP0008705.

In short, "the undisclosed evidence was not duplicative of the impeachment evidence actually presented, but rather was of a different kind. It would have provided the defense with a new and different ground of impeachment." *Silva*, 416 F.3d at 989 (internal quotation marks omitted). Because the undisclosed evidence was material, partial summary judgment against Defendant Aiello as to liability is appropriate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment against Defendant Aiello.

Dated: March 25, 2016
New York, New York

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